IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN

S.B. Criminal Appeal No.23/2001

Abdul Haneef S/o Munna Khan ...accused appellant
Versus
The State of Rajasthan . ...Respondent

Date of Judgment ::: February___, 2006

PRESENT
Hon'ble Mr. Justice Narendra Kumar Jain

Shri Sharad Purohit for the accused appellant
Shri Amit Punia, Amicus Curiae
Shri B.S. Chhaba, P.P., for the State

By the Court:-

Hard learned counsel for the parties.

Accused appellant Abdul Haneef has filed this appeal under Section 374 of the Code of Criminal Procedure, against the judgment and order, dated 18.12.2000, of the Special Judge, N.D.P.S. Act, Bundi, in Sessions Case No.26/2000, whereby the accused appellant was convicted under Section 8/20 of the N.D.P.S. Act, 1985 (for short, 'the Act') and sentenced to ten years rigorous imprisonment and fine of Rs.1,00,000/-; in default of payment of fine, to further undergo two years rigorous imprisonment.

PW-1 Ram Deo lodged F.I.R. No.109/2000 on

31.3.2000 at Police Station Keshorai Patan, District Bundi, wherein it was alleged that on 31.3.2000 at about 10.20 A.M. He received a secret information from one informer that accused Abdul Haneef is sitting near Bank of Baroda and he is in possession of 'charas'. Thereafter he went at the spot and found Abdul Haneef in suspicious position. Thereafter the accused Abdul Haneef was searched and he recovered 'charas' from the possession of the accused. The contraband was weighed as 45 gram. A sample of 5 gram was taken and remaining 40 gram 'charas' was sealed. On the basis of this information a case under Section 8/20 of the Act was registered and investigation commenced.

After completion of investigation the police filed a challan against the accused appellant for the offence under Section 8/20 of the Act. The learned trial court framed charge against the accused appellant for the offence under Section 8 read with Section 20 of the Act. The accused denied the charge and claimed to be tried. In support of its case the prosecution examined eight witnesses and produced documents Exhibit-1 to Exhibit-18A. Thereafter statement of the accused was recorded under Section 313 Cr.P.C. wherein he stated that the prosecution evidence is false and

nothing was recovered from him. He was beaten and a false case was registered against him. In defence, he produced documentary evidence Exhibit D-1 to Exhibit D-3.

The learned trial court, after hearing both the parties, convicted and sentenced the accused appellant as mentioned above.

The learned counsel for the accused appellant has argued the case at length and contended that the learned trial court has wrongly convicted and sentenced the accused appellant for the above offence. He alternatively contended that the accused appellant has already remained in jail for about five years and eleven months and looking to the small quantity of the contraband, i.e. 45 gram 'charas', the minimum sentence of ten years imprisonment awarded by the trial court be reduced to a period of imprisonment already undergone by him in view of amendment made in the Act in 2001 specifying the small and commercial quantity of the contraband and separate sentence is provided therefor. In support of his contention, he referred the decision of the Uttaranchal High Court in **Man Mohan @ Bhuri v. State of Uttaranchal, 2003 Cri.L.J. 4506**, wherein, looking to the small quantity of contraband, i.e. 70

gram 'charas', the Uttaranchal High Court reduced the minimum sentence of ten years to a period of sentence of imprisonment (two and half year) already undergone by the accused in that case, extending the benefit of amendment in the Act in the year 2001.

The learned Public Prosecutor, on the other hand, contended that the learned trial court has rightly convicted and sentenced the accused appellant and no case for interference of this Court is made out.

I have considered the rival submissions and examined the impugned judgment as well as the record of the trial court.

Apart from other arguments of the learned counsel for the accused appellant, I find that in this case PW-1 Ram Deo, who received the information and made search of the accused appellant, admitted in his statement before the court that he did not serve any notice under Section 50 of the Act before the search of the accused appellant. He stated that he gave oral notice to the accused. The learned Public Prosecutor does not dispute that no notice under Section 50 of the Act in writing was given to the accused appellant apprising him about his right to get himself searched before Magistrate or before authorized Gazetted

Officer.

It is further borne out from the record that after receipt of secret information and before the search, the Investigating Officer/Recovery Officer did not call two independent witnesses in the present case. PW-1 Ram Deo has stated that Exhibit P-4 is the copy of order which he issued to Govind Singh, Head Constable, to bring two independent witnesses against the accused but Govind Singh reported that no person is willing to become witness against the accused, therefore, he directed his subordinate to become witness. I have examined the document Exhibit P-4 and found that Govind Singh has not reported as to whom he contacted and who refused him to become witness in the case. I further find that PW-1 Ram Deo did not make any effort to request any person of the locality to become independent witness in the present case. He did not give any notice in writing to any witness. As per sub-section 8 of Section 100 Cr.P.C. any person who, without reasonable cause, refuses or neglects to attend and witness a search under this Section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under Section 187 I.P.C. Therefore it cannot be

believed that any person of locality was not willing to attend and witness the search. There were two witnesses to the recovery as well other exhibits of the prosecution, namely, Chhagan Lal (PW-6) and Bhagwan Singh (PW-8), and both were police persons, subordinate to the Investigating Officer. Therefore, no independent witness was called in the present case.

I further find that the prosecution did not produce even F.S.L. Report in the present case upto 6.12.2000 the date of arguments so as to prove that the contraband was 'charas', punishable under Section 8/20 of the Act. The trial court on 5.12.2000 fixed the case for arguments on 6.12.2000. On 6.12.2000 the arguments were heard and concluded and the case was fixed for pronouncement of judgment on 14.12.2000. On 14.12.2000 the judgment was not pronounced but time was granted to the Additional Prosecutor to produce copy of F.S.L. Report. The statement of the accused under Section 313 Cr.P.C. had already been recorded on 22.11.2000 wherein not a single question was put to accused about F.S.L. Report. However, after arguments of the case on 6.12.2000 and fixing the case for pronouncement of judgment on 14.12.2000 time was given to produce F.S.L. Report and thereafter on 18.12.2000 the trial court put

two questions to accused including the question that there is F.S.L. Report against him marked as 'AB', in continuation of his earlier statement recorded under Section 313 Cr.P.C. on 22.11.2000. However, copy of F.S.L. report was not made available to the accused and further, the result of report was not incorporated in the question.

In these circumstances I find that the prosecution did not make any effort to bring any independent witness in this case as required under Section 100 Cr.P.C. The giving of notice under Section 50 of the Act apprising the accused about his right for his search either before Magistrate or before Gazetted Officer, is missing in the present case. The F.S.L. Report was not produced along with the charge-sheet and a copy of it was not made available to the accused. The F.S.L. Report was not filed by the prosecution till arguments were concluded on 6.12.2000 and the case was fixed for pronouncement of judgment on 14.12.2000. It appears that on 18.12.2000 a copy of F.S.L. Report was placed on record but a copy of it was not made available to the accused and only a formality was done by the learned trial court by asking one question about F.S.L. Report and that question further shows that no

details of the result of report was mentioned in it. In these circumstances I find that the prosecution has failed to prove the case against the accused appellant beyond reasonable doubt and accused is entitled to get the benefit of doubt.

Consequently the appeal is allowed. The impugned judgment of conviction and sentence passed by the learned trial court on 18.12.2000, is set aside and accused appellant Abdul Haneef is acquitted. The accused is in judicial custody and he may be released forthwith, if his custody is not required in any other case.

(Narendra Kumar Jain) J.

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